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FEBRUARY 15, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Scott Horst, Plaintiff/Appellee, v. Charlotte Horst, Defendant/Appellant and State of North Dakota Statutory Real Party in Interest	Morton County District Court No. 30-07-C-00374 Supreme Court No. 20180402

ON APPEAL FROM ORDER ON MOTIONS DATED OCTOBER 31, 2018; AND FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT, AND THIRD AMENDED JUDGMENT AND PARENTING PLAN DATED NOVEMBER 21, 2018

FROM THE DISTRICT COURT FOR THE
SOUTH CENTRAL JUDICIAL DISTRICT
MORTON COUNTY, NORTH DAKOTA
THE HONORABLE GAIL HAGERTY, PRESIDING

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, CODES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

[¶1.] Whether a party may receive a new trial, an amended judgment, or relief from judgment under N.D.R.Civ.P. 59 and N.D.R.Civ.P. 60 when a motion was not presented in the district court.

[¶2.] Whether a motion for an annulment of a marriage was properly denied after a judgment for a divorce had been granted.

[¶3.] Whether a party before this Court must adequately cite factual allegations for this Court to consider the arguments.

[¶4.] Whether the interim order procedures under N.D.R.Ct. 8.2 may be challenged for due process violations where the party challenging the constitutionality of the rule did not provide legal analysis or citations to authorities.

[¶5.] Whether an argument challenging N.D.R.App.P. 32(a)(8)(A) is properly raised when the party challenging under due process grounds did not move this court to exceed the word count limit for principal briefs.

[¶6.] Whether double costs, including reasonable attorney's fees, may be awarded for this frivolous appeal under N.D.R.App.P. 38.

[¶7.] Whether the Court may sanction Charlotte for failing to cite to the record for her factual allegations in her brief under N.D.R.App.P. 13.

STATEMENT OF THE CASE

[¶8.] The parties, Scott Horst and Charlotte Horst, were married on January 29, 2004; during the marriage two children were born: D.J.H. born in 2003 and S.J.H. born in 2006. Docket Entry #1, Complaint ¶¶2–3. A judgment granting their divorce was entered on September 17, 2008. See Docket Entry #16, Judgment. The original Judgment granted Scott primary residential

responsibility of both children subject to Charlotte's supervised visitation. Id. at ¶¶2–3. By a stipulation of the parties, the district court amended its judgment in October 2008 to permit Charlotte to exercise unsupervised parenting time every other weekend. Docket Entry #19, Amended Judgment ¶3.

[¶9.] Scott sought to amend the judgment so that the terms of the district court's original judgment were re-implemented. Docket Entry #53, Brief in Support of Motion to Modify Judgment ¶5; see Docket Entry #52, Motion to Modify Judgment 1. He also sought an ex parte interim order under N.D.R.Ct. 8.2(a) which would establish supervised parenting time for Charlotte. Docket Entry #56, Motion for Ex Parte Interim Order ¶1(a). The district court granted Scott's request for supervised visitation while his motion for modification of the judgment was pending. Docket Entry #68, Ex Parte Interim Order and Notice of Hearing ¶1(a). Charlotte's parenting time remained supervised after the district court entered an interim order upon holding a hearing. Docket Entry #80, Interim Order ¶1(a).

[¶10.] From the time the interim order was entered until the evidentiary hearing on Scott's motion to modify the judgment, Charlotte filed and served numerous motions with the district court. The district court addressed these motions in two orders. See Docket Entry #123, Order; App. 112a–117a. The first order—which has not been appealed—denied Charlotte's motion to dismiss the interim order, denied Charlotte's motion to annul the parties' marriage, denied Charlotte's motion to dismiss Scott's motion to modify the judgment, and ordered that an evidentiary hearing should be held. Docket Entry #123, Order. The second order, which has been appealed, denied Charlotte's renewed motions to annul the parties' marriage and dismiss the interim order. App. 115a.

[¶11.] After an evidentiary hearing, the district court adopted Scott's proposed parenting plan. App. 117a. The district court considered relevant best interests of the children factors. App. 115a–117a; see App. 118a–119a (adopting findings of fact from district court's prior order). Prior to the district court entering an amended judgment, Charlotte filed a notice of appeal with this Court. Docket Entry #165, Notice of Appeal. The Court remanded the case to the district court so that the district court could enter its judgment. Docket Entry #168, Order of Remand ¶2. Charlotte later filed a second notice of appeal. Docket Entry #181, Second Notice of Appeal.

STATEMENT OF FACTS

[¶12.] Since the district court's original judgment, Charlotte pled guilty to Removal of a Child from State in Violation of Custody Decree. App. 114a. A disorderly conduct restraining order was also entered against Charlotte which prohibited her from coming within 100 yards of Scott, the parties' children, or their residence. App. 115a. Since returning to North Dakota, she has resided at numerous residences. App. 116a.

[¶13.] The district court found that Scott had been providing care, nurture, and guidance for the children. Id. And he has a stable home environment for the children. Id. Charlotte, the district court concluded, was likely to remove the children from the state again as she still believed her actions were appropriate. Id. The district court also found that Charlotte "is preoccupied with rather bizarre conspiracy theories," and there was "concern for her mental health." App. 117a. Additionally, Charlotte was not receiving proper care to address her mental health. Id.

ARGUMENT

[¶14.] Charlotte has not alleged that the district court's findings of facts were clearly erroneous. See Dieterle v. Dieterle, 2013 ND 71, ¶6, 830 N.W.2d 571 ("A court's decision awarding primary residential responsibility is a finding of fact which will not be reversed on appeal

unless it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record we are left with a definite and firm conviction a mistake has been made."). Instead, various procedural, criminal, and constitutional claims have been raised. These arguments are either improperly raised in the first instance on appeal, are based on facts not in the record, or are meritless.

I. Charlotte Did Not Make a N.D.R.Civ.P. 59 or 60 Motion

(a) Standard of Review

[¶15.] The Court uses the same standard when reviewing motions for a new trial, to amend judgments under N.D.R.Civ.P. 59, and for relief from judgment under N.D.R.Civ.P. 60. Flaten v. Couture, 2018 ND 136, ¶27, 912 N.W.2d 330 (standard for amending judgments and relief from judgment); Rath v. Rath, 2018 ND 138, ¶10, 911 N.W.2d 919 (standard for new trials). The motions are reviewed under an abuse of discretion standard. Id. "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Flaten, at ¶27 (citing Werven v. Werven, 2016 ND 60, ¶24, 877 N.W.2d 9).

(b) This Court Cannot Review Motions That Were Not Presented To The District Court

[¶16.] N.D.R.Civ.P. 59 permits a motion requesting "a re-examination of an issue of fact in the same court, after a trial and decision by a . . .court . . ..", and a motion "to alter or amend a judgment. . .." N.D.R.Civ.P. 59(a), (j). N.D.R.Civ.P. 60 permits a party to seek either a clerical correction of a judgment or order, or to seek relief from a final judgment or order. N.D.R.Civ.P. 60(a)–(b).

[¶17.] In this case, there is nothing for this Court to review as Charlotte did not file a Rule 59 or Rule 60 motion in the district court. The Court "does not consider questions that were not presented to the trial court and that are raised for the first time on appeal." Hoff v. Hoff, 2018 ND 115, ¶7, 910 N.W.2d 896 (quoting Dixon v. Dixon, 2017 ND 174, ¶25, 898 N.W.2d 706). Therefore, this Court should reject the Charlotte's arguments based on Rule 59 and Rule 60.

[¶18.] This Court should also not interpret her brief as a motion based under Rules 59 or Rule 60. The rules of civil procedure apply to "all civil actions and proceedings in district court . . .." N.D.R.Civ.P. 1. The rules do not apply to motions filed with this Court. See N.D.R.App.P. 1 ("These rules govern procedure in the supreme Court of North Dakota."); N.D.R.App.P. 27 (governing default motion procedure rules filed in this Court).

II. Charlotte's Request For An Annulment Was Properly Denied

(a) Standard of Review

[¶19.] Although it appears to not be clearly established, the Court has applied an abuse-of-discretion standard for reviewing post-judgment motions that are not reviewed under a different standard of review. See Anderson v. Lyons, 2014 ND 61, ¶5, ¶18, 845 N.W.2d 1 (applying abuse-of-discretion standard to a motion seeking to amend caption of the case, amend the trial court's findings, and for a new trial post-judgment).

[¶20.] "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Flaten v. Couture, 2018 ND 136, ¶27, 912 N.W.2d 330 (citing Werven v. Werven, 2016 ND 60, ¶24, 877 N.W.2d 9).

(b) The District Court Correctly Concluded The Motion For Annulment Should Be Denied In Light Of The Parties' Divorce Judgment

[¶21.] A party to a marriage may seek an annulment of the marriage under specific statutory grounds. N.D.C.C. §14-04-01. Before the district court, Charlotte specifically cited statutory provisions which permit annulment when the consent of a party to the marriage was obtained by fraud or force. N.D.C.C. §§14-04-01(4) and (5); see Docket Entry #138, Motion for Annulment. The district court ruled on Charlotte's motion, holding "[b]ecause there is a divorce judgment, the request to grant an annulment is DENIED." Docket Entry #159, Order on Motions.

[¶22.] The language of the district court's order most naturally reads as a determination that an annulment is moot due to the divorce judgment. Actions "become moot by the occurrence of events that result in a court's inability to render effective relief. Poochigian v. City of Grand Forks, 2018 ND 144, ¶9, 912 N.W.2d 344 (citation omitted). The Court will not decide actions when "there is no actual controversy left to be determined and the issues have become moot or academic." Id. (citation omitted). However, "an issue technically moot will not be considered moot if it is capable of repetition yet evading review, or if the controversy if one of great public interest and involves the power and authority of public officials." Van Valkenburg v. Paracelsus Healthcare Corp., 2000 ND 38, ¶10, 606 N.W.2d 908 (quoting Nord v. Herrman, 1998 ND 91, ¶12, 577 N.W.2d 782). This case does not involve the power and authority of public officials and does not involve an issue capable of repetition yet evading review.

[¶23.] In this case, Charlotte's motion for annulment was moot as she has not identified how the district court would be able to render effective relief. The parties' children will still be able to inherit from both parents as they were begotten well before the district court could enter a judgment of annulment. N.D.C.C. §14-04-03. The district court would still determine custody on the basis of the best interests of the children factors. N.D.C.C. §14-04-04. The judgment did not

distribute marital assets or debts. Docket Entry #16. And regardless of current or former marital status, parents owe an obligation of support to their children. N.D.C.C. §14-09-08. The district court could not grant relief through an annulment that Charlotte has not already received through the judgment granting a divorce. In proper cases, an annulment can offer different relief than a divorce. See *Annulment*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("An annulment establishes that the marital status never existed. So annulment and dissolution of marriage (or divorce) are fundamentally different: an annulment renders a marriage void from the beginning while dissolution of marriage terminates the marriage as of the date of the judgment of dissolution."). But on the facts of this case, a postjudgment motion for annulment is moot due to the previously entered divorce decree.

[¶24.] Even if the Court determines Charlotte's motion was not moot, the district court's denial may be affirmed as harmless error. N.D.R.Civ.P. 61; see also Darby v. Swenson Inc., 2009 ND 103, ¶15, 767 N.W.2d 147 (affirming district court's decisions on other grounds). Harmless error is "any error, defect, irregularity or variance which does not affect substantial rights." Hamilton v. State, 2017 ND 54, ¶8, 890 N.W.2d 810 (quoting State v. Acker, 2015 ND 278, ¶12, 871 N.W.2d 603).

[¶25.] The district court's denial of Charlotte's motion is harmless error because the annulment would be untimely. When a party seeks an annulment on the basis that their consent was obtained by force, the action for annulment must be brought "within four years after the marriage." N.D.C.C. §14-04-02. The parties were married on January 29, 2004. Docket Entry #2, Complaint ¶2. Charlotte's 2018 motion was well past the time permitted.

[¶26.] When the annulment is sought on the basis of fraud, a party must bring the action within four years after the discovery of the facts constituting the fraud. N.D.C.C. §14-04-02.

Charlotte does not clearly articulate the alleged fraud that forms the basis of her claim for annulment. However, it seems to be a reasonable inference that she would have been aware of any grounds of fraud by the time the divorce judgment was entered—which means her motion was past the time permitted by statute.

[¶27.] Furthermore, the district court's order on Charlotte's motion can be affirmed as harmless error as she does not cite to evidence in the record to show she would have been entitled to the annulment either on the basis of fraud or force.

III. Charlotte Fails To Cite To Facts Supporting Allegations of Criminal Violations

(a) Standard When Reviewing Uncited Factual Allegations

[¶28.] When reviewing alleged factual support for a party's claims, "neither this [C]ourt nor the district court has any duty or obligation to ferret through the record to locate evidence to support factual allegations." Schiele v. Schiele, 2015 ND 169, ¶18, 865 N.W.2d 433 (quoting Peterson v. Zerr, 477 N.W.2d 230, 235 (N.D. 1991)).

(b) Charlotte Does Not Cite Factual Allegations, Nor Is There Evidence In The Record, To Support Her Claims of Criminal Violations

[¶29.] Charlotte claims that Scott, the United State government, and the State of North Dakota are violating various criminal provisions. Appellant's Br. ¶¶10–11. Charlotte fails to cite to the record supporting these allegations. See Peterson v. Zerr, 477 N.W.2d 230, 235 (N.D. 1991) ("[N]either this court nor the district court has any duty or obligation to ferret through the record to locate evidence to support factual allegations."). There is no support in the record for the Charlotte's sweeping allegations. She does not provide sufficient explanation as to what factually happened to permit this Court to find reversible error in the district court proceedings.

IV. Charlotte Has Not Established N.D.R.Ct. 8.2 Violates Her Due Process Rights

(a) Standard of Review

[¶30.] Conclusions of law are reviewed de novo. See, e.g., Beaudoin v. S. Tx. Blood & Tissue Ctr., 2005 ND 120, ¶9, 699 N.W.2d 421 (quoting Ensign v. Bank of Baker, 2004 ND 56, ¶11, 676 N.W.2d 786) (applying de novo standard for legal conclusions in context of determination of personal jurisdiction).

(b) Charlotte Has Not Provided Sufficient Analysis To Challenge The Constiutitonality Of Interim Order Procedures

[¶31.] Constitutional arguments that are not properly briefed may be waived on appeal. See State v. Gray, 2017 ND 108, ¶14, 893 N.W.2d 484 (rejecting invitation to review claim statute was vague). A party must use "heavy artillery" to find laws and court rules unconstitutional. Id. (quoting Gray v. Berg, 2016 ND 82, ¶13, 878 N.W.2d 79). The Court applies the following rule:

> [A] party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit. Absent authority and a reasoned analysis to support it, the mere assertion of unconstitutionality is insufficient to adequately raise a constitutional question. Courts cannot be expected to search through the record and applicable case law to discover deprivations of a constitutional magnitude when the party attempting to claim a constitutional violation has not bothered to do so. A party pursuing a constitutional claim must therefore make a strong case supported by both fact and law or forgo the claim.

Id. (quoting Weeks v. N.D. Workforce Safety & Ins. Fund, 2011 ND 188, ¶8, 803 N.W.2d 601) (alteration in original).

[¶32.] Charlotte did not cite to any legal authorities to support that the interim order procedures under N.D.R.Ct. 8.2 violated her rights to due process. She also did not cite to facts within the record that support her arguments. Charlotte did not provide sufficient analysis for her arguments and has therefore waived her argument.

(c) Even If The Court Considers Charlotte's Due Process Claim, The Interim Order Procedures Do Not Violate Her Due Process Rights

[¶33.] Even if the Court reaches Charlotte's constitutional challenge to N.D.R.Ct. 8.2, the procedures do not violate her due process rights. "Statutes and rules are presumed to be constitutional and courts will construe them to be constitutional if possible." S.B. v. Bjerke, 2014 ND 87, ¶17, 845 N.W.2d 317 (quoting State ex rel. Roseland v. Herauf, 2012 ND 151, ¶7, 819 N.W.2d 546). Therefore, she has the burden to show that the procedure for interim orders under N.D.R.Ct. 8.2. is unconstitutional.

[¶34.] The Court has recently recited the general due process standard:

> The state and federal constitutions provide the State may not deprive any person of life, liberty or property without due process of law. See U.S. Const. amend. XIV, §1; N.D. Const. art. I, §12. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Arnegard v. Arnegard Twp., 2018 ND 80, ¶29, 908 N.W.2d 737 (quoting Coon v. N.D. Dep't of Health, 2017 ND 215, ¶28, 901 N.W.2d 718, reh'g denied, Sept. 29, 2017) (internal quotations and citations omitted). Assuming a protected interest is found, the Court must then consider

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens than the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In this case, "[p]arents have a fundamental, natural right to their children which is of constitutional dimension," and there is a protected interest that triggers the Eldridge factors. Guardianship of Barros, 2005 ND 122, ¶9, 701 N.W.2d 402 (quoting Hoff v. Berg, 1999 ND 115, ¶10, 595 N.W.2d 285).

[¶35.] Although parents have fundamental interests in their children, this case does not involve the more commanding interest involved with a termination of parental rights or even a

juvenile guardianship. See In re N.A., 2016 ND 91, ¶13, 879 N.W.2d 82 (applying first factor in Eldridge analysis in context of termination of parental rights action). This case does not involve a third-party seeking parental rights against a parent, but rather two parents seeking to determine their mutual parental rights and responsibilities. The first factor therefore does weigh in the mother's favor, but not significantly.

[¶36.] Applying the second factor, Charlotte has not established the risk of erroneous deprivation and the probable value of additional procedures. When a party seeks an interim order, a hearing must be held unless there are exceptional circumstances. N.D.R.Ct. 8.2(a)(1). Both parties are permitted to submit evidence, and both may exercise a right of cross-examination. N.D.R.Ct. 8.2(e). Furthermore, interim orders—as the name suggests—are temporary determinations of rights that are superseded by a final judgment in the case. See N.D.R.Ct. 8.2(b)(2). The risk of erroneous deprivation is minimal under these procedures, and it is unlikely additional procedures short of a full trial on the interim order would reduce the risks of erroneous deprivation. The second factor therefore favors upholding N.D.R.Ct. 8.2.

[¶37.] Finally, Charlotte has not alleged that there are alternative procedures with less administrative burdens than the current interim order procedures. Therefore, the last factor also favors upholding N.D.R.Ct. 8.2.

[¶38.] Even if Charlotte showed that the procedure violated her due process rights, the issue is now moot in light of the district court's final judgment in the case. See Rodriguez v. N.D. State Penitentiary, 2014 ND 49, ¶6, 843 N.W.2d 692 (quoting State v. Grager, 2006 ND 102, ¶11, 713 N.W.2d 531 ("'When it becomes impossible for the Court to issue relief, no controversy exists and the issue is moot.'").

V. The Defendant's Other Claims Are Meritless

[¶39.] Charlotte raises constitutional claims under all ten amendments of the Bill of rights, the 11th Amendment, 13th amendment, and the 15th amendment. She also makes other arguments that were not presented to the district court. Even if the Court considers the allegations, they are meritless. Much like her argument regarding the constitutionality of the interim order procedures, Charlotte has failed to us the "heavy artillery" to challenge statutes and court rules related to this case. State v. Gray, 2017 ND 108, ¶14, 893 N.W.2d 484. Furthermore it is unclear exactly how many of these constitutional rights are relevant to this matter.

VI. The Defendant Has Not Been Denied Due Process Regarding Her Word Count

[¶40.] Under N.D.R.App.P. 32(8)(A), principal briefs may not exceed 8,000 words. Although it is not a routine practice, in exceptional circumstances the Court may for good cause suspend any of its procedural rules in a particular case. N.D.R.App.P. 2. Charlotte has not requested the Court to exceed the wordcount. Additionally, no argument has been presented of what Charlotte would additionally present if provided the opportunity. Even if imposing a word count violated due process, Charlotte cannot argue it was denied when she did not request the Court for additional space to make her arguments.

VII. The Court Should Award Damages, Costs, And Sanctions For This Appeal

[¶41.] The Court, if it determines that an appeal is frivolous, "may award just damages and single or double costs, including reasonable attorney's fees." N.D.R.App.P. 38. The Court "make take appropriate action against any person failing to perform an act required by rule or court order." N.D.R.App.P. 13. Rule 38 does not limit sanctions that may be also available under Rule 13. N.D.R.App.P. 38 cmt. ("It is not intended that Rule 38 limit Rule 13).

[¶42.] "An appeal is frivolous when it is flagrantly groundless." In re Estate of Nelson, 2018 ND 118, ¶13, 910 N.W.2d 856 (quoting Podrygula v. Bay, 2014 ND 226, ¶23, 856 N.W.2d 791). An assessment of fees and costs is appropriate "[w]here the appellant's arguments are both factually and legally so devoid of merit that he should have been aware of the impossibility of success on appeal. . ." Id. Charlotte cites a plethora of statutes and constitutional provisions that have no bearing on this case. She should not have reasonably expected to win this appeal. Her status as a pro se party is not considered when determining if the appeal was flagrantly groundless. In re Estate of Nelson, at ¶13 (quoting State v. Kremer, 2018 ND 61, ¶7, 907 N.W.2d 403). An affidavit documenting the legal work performed has been filed with this brief. United Valley Bank v. Lamb, 2003 ND 149, ¶5 n. 1, 669 N.W.2d 117 ("We have held that a request for attorney's fees should be accompanied by an affidavit documenting the work performed on appeal if more than a nominal amount is requested") (citations omitted).

[¶43.] Additionally, Charlotte has failed to comply with the rules of appellate procedure and should be sanctioned accordingly. Under N.D.R.App.P. 28(b)(6), an appellant is required to include a statement of the relevant facts and appropriate references to the record. Additionally, in the argument section, the appellant must cite to authorities and parts of the record upon which they rely. N.D.R.App.P. 28(b)(7)(A). The Court has previously sanctioned a party whose entire fact section was devoid of any citation to the record. Carpenter v. Rohrer, 2006 ND 111, ¶39, 714 N.W.2d 804. In this case, Charlotte failed to include any citations to the record in her entire brief. This was while Charlotte attempted to include facts that she alleged formed the basis of criminal activity. The Court should issue an appropriate sanction for her failure to comply with the procedural rules.

CONCLUSION

[¶44.] Because Charlotte has not shown there was reversable error in the district court proceedings, this Court should affirm the lower court's findings, orders, and judgment. As Charlotte has failed to comply with this Court's rules and has also filed a frivolous appeal, the Court should award sanctions and double damages.

Dated: February 15, 2019

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CERTIFICATE OF COMPLIANCE

I, William D. Woodworth, as the attorney for the Appellee and the author of this brief, hereby certify that this brief is in compliance with N.D.R.App.P. 32(a)(8)(A). This brief used a proportional typeface and the number of words in this brief (excluding words in the table of contents, the table of authorities, and the addendums to this brief) totals 4,241.

Dated: February 15, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Scott Horst, Plaintiff/Appellee, v. Charlotte Horst, Defendant/Appellant and State of North Dakota Statutory Real Party in Interest	Morton County District Court No. 30-07-C-00374 Supreme Court No. 20180402 **CERTIFICATE OF SERVICE**

I, William D. Woodworth, certify that on February 15, 2019, I served the following documents by Electronic Service under N.D.R.App.P. 25(b)(1)(D):

1. Appellee's Brief

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Dated: February 15, 2019.

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